1999

Utah v. Ashcraft : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, vs. SHANNON JESS ASHCRAFT, Defendant and Appellant.	Case No. 990678-CA Priority No. 2

BRIEF OF APPELLEE

AN APPEAL FROM A JUDGMENT OF CONVICTION FOR POSSESSION OF A FIREARM BY A RESTRICTED PERSON, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-10-503(2) (SUPP. 1997), AND POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-10-503(2) (SUPP. 1997), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, TOOELE COUNTY, THE HONORABLE LEE DEVER PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff and Appellee,** **vs.** **SHANNON JESS ASHCRAFT,** **Defendant and Appellant.**	**Case No. 990678-CA** **Priority No. 2**

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

The defendant appeals from a judgment of conviction for possession of a firearm by a restricted person, a second degree felony, in violation of Utah Code Ann. § 76-10-503(2) (Supp. 1997), and possession of a dangerous weapon by a restricted person, a third degree felony, in violation of Utah Code Ann. § 76-10-503(2) (Supp. 1997). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES

FIRST ISSUE ON APPEAL. Did the trial court abuse its discretion when it denied defendant's motion for a new trial alleging prosecutorial misconduct in closing argument where the prosecutor was responding to defendant's evidence and the trial court sustained defendant's objection and had given a curative instruction immediately preceding the comment?

Standard of Review. The trial court is in the best position to determine the impact of a prosecutor's remark upon the proceedings. *State v. Longshaw*, 961 P.2d 925, 927 (Utah App. 1998). Accordingly, this Court will review a trial court's ruling on a motion for a new trial alleging prosecutorial misconduct for an abuse of discretion. *Id.*; *see also State v. Loose*, 2000 UT 11, ¶ 8 (the appellate court reviews a trial court's ruling on a motion for new trial for an abuse of discretion).

SECOND ISSUE ON APPEAL. Was the evidence sufficient to sustain the jury's verdict?

Standard of Review. The appellate court affords great deference to the jury verdict and will not reverse a jury conviction for insufficiency of the evidence unless "the evidence is so lacking and insubstantial that reasonable [people] could not possibly have reached a verdict beyond a reasonable doubt." *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute is of central importance to the appeal:

Utah Code Ann. § 76-10-503 (2) (Supp. 1997)

> (2) (a) Any person who is on parole or probation for a felony may not have in his possession or under his custody or control any explosive, chemical, or incendiary device as those terms are defined in Section 76-10-306 or dangerous weapon as defined in Section 76-10-501.
>
> (b) Any person who violates this subsection is guilty of a third degree felony, but if the dangerous weapon is a firearm or an explosive, chemical, or incendiary device he is guilty of a second degree felony.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged by information with possession of a firearm by a restricted person, a second degree felony, and possession of a dangerous weapon by a restricted person, a third degree felony. R. 99: 02. A jury found defendant guilty on both counts. R. 99: 38-39, 99: 171. Defendant was sentenced to consecutive prison terms of one-to-fifteen years and zero-to-five years. R. 99: 45-46. The court denied defendant's motion for a new trial which alleged that but for the prosecutor's closing remarks regarding the anonymous report to police that defendant brandished a firearm, defendant would not have been convicted of possession of a firearm by a restricted person. R. 47-53, 66-76, 94-96. Defendant timely appealed. R. 97.

SUMMARY OF FACTS

An Anonymous Tip. On the evening of June 9, 1997, Officer Robert Eckman, an agent with Adult Probation and Parole (AP&P), was shopping at the Tooele Wal-Mart. R. 99: 50, 55. While there, Officer Eckman noticed defendant drive a white minivan into a parking stall. R. 99: 55. Officer Eckman knew defendant as a parolee under AP&P's supervision. R. 99: 51-52. Earlier that day, he had received an anonymous tip that defendant was brandishing a firearm and making threats in public. R. 99: 51. Defendant had been paroled from prison just four months earlier and was prohibited under his parole agreement from having under his control or custody any firearms or dangerous weapons. R. 99: 52, 54.

Despite repeated efforts, Officer Eckman had been unable to locate defendant earlier that day. R. 99: 54-55.

Defendant's Arrest. Upon observing defendant in the parking lot, Officer Eckman immediately returned home, obtained his weapon, and, after calling for backup, returned to Wal-Mart in his State vehicle. R. 99: 56. Defendant was backing out of his parking stall as Officer Eckman pulled into the parking lot. R. 99: 56. Officer Eckman activated his overhead lights and pulled in behind defendant. R. 99: 56. Officer Travis Sutherland from the Tooele Police Department assisted Officer Eckman in the stop, parking along side the van. R. 99: 56-57, 84. In the van with defendant were defendant's girlfriend, Heather Johansen, Victor Lopez, and April Garcia. R. 99: 59, 105-06, 112-13. Johansen was seated in the front passenger seat of the van, Lopez sat in the middle seat directly behind defendant, and Garcia sat next to him. R. 99: 60, 112. The officers searched defendant and all three passengers but found no weapons. R. 99: 58-60.

Although defendant did not own the van, he had previously identified the van for AP&P as the vehicle he would be driving. R. 99: 82-83. During a search of the van, Officer Sutherland found a large, "fighting style" knife tucked in between the driver's seat belt bracket and the driver's seat, readily accessible to the driver's right hand. R. 99: 62-63, 84-86. The blade of the knife was curved with a hook on the end and the handle was lined with spikes for striking. R. 99: 85-86. Officer Eckman also found a box filled with 44 and 38 caliber shells, both spent and unspent, in the sliding glove box under the passenger seat of the van. R. 99: 64-65. Officers did not find a handgun in the van. R. 99: 66. Having found

defendant in possession of the knife, officers arrested defendant for violating his parole. *See* R. 99: 66.

Search of Defendant's Residence. Defendant had last reported to AP&P that he was living at the residence of a girlfriend, Tabitha Patton. R. 99: 119-20, 128-29. Accordingly, after taking defendant into custody, Officer Eckman went to Patton's home to search for the anonymously reported weapon. R. 99: 128. After Officer Eckman advised Patton why he was there, she told him that he would not find a weapon in the apartment because defendant had not been staying there for several days. R. 99: 128-29. After defendant informed Officer Eckman that he had been staying with Ms. Johansen, Eckman took defendant with him to search her apartment for the firearm, but again failed to find a gun. R. 99: 130.

Defendant's Confession. Deputy Mike Stidham of the Tooele County Sheriff's Office met with defendant in jail the following day. R. 99: 40, 46. After Deputy Stidham advised defendant of his constitutional rights, defendant agreed to speak with him. R. 99: 41. Defendant told Deputy Stidham that he had purchased a .44 handgun from a friend and that Deputy Stidham could find the gun at Ms. Johansen's home in Tooele. R. 99: 42. At Deputy Stidham's request, defendant called Johansen and told her that Deputy Stidham would be coming to her house to retrieve the gun. R. 99: 43.

Recovery of the Handgun. Upon Deputy Stidham's arrival, Johansen escorted him downstairs to the handgun where it lay on the bar. R. 99: 43-44, 93. The gun was a 44 caliber Red Hawk Reuger bearing serial number 500-00864. R. 99: 70, 93. Johansen then took the deputy to a storage room adjacent to the bar and told the deputy that defendant had

put the gun in the drop ceiling of the storage room. R. 99: 44, 48. After seizing the gun, Deputy Stidham delivered it to Officer Eckman. R. 99: 45, 50.

Written Statements and a Bill of Sale. The day after defendant's arrest, Ms. Johansen brought to AP&P an original bill of sale, signed by defendant, indicating that on June 3, 1998, Bill Besmehn sold a Reuger, Red Hawk gun, serial number 500-00864, to defendant for $300. R. 99: 68-69. That same day, Johansen gave a note to police indicating that defendant "left his gun in [her] possession and he never had access or never intended to have access to his weapon." R. 99: 74. Sometime later that day, Ms. Johansen gave police another hand-written statement which read:

> I, Heather Johansen, was with Shannon Ashcraft on the 3rd day of June 1998, when he purchased the Reuger Red Hawk, serial number 500-00864, and a box of bullets from Bill Besmehn. Shannon's friend, Bill Besmehn, had told Shannon that he needed money to pay his rent for the month and asked if Shannon would purchase the Reuger Red Hawk. Shannon and I both knew he was on parole and could not have the gun in his possession. That is why the gun was taken straight to a residence where we both felt comfortable leaving it. The gun was in neither of our possession until June 10, 1998, when I went and picked it up and handed it over to Officer Stidham.

R. 99: 71-74, 127-28.

SUMMARY OF ARGUMENT

Prosecutor's Remarks in Closing Argument. The prosecutor's comment in closing argument regarding the anonymous tip did not constitute prosecutorial misconduct. The State concedes that the prosecutor initially could not introduce evidence of an anonymous tip that defendant was brandishing a firearm to prove that he had a weapon. However, when defense counsel cross-examined the officer regarding his failure to learn the identity of the

anonymous caller or the accuracy of the report, he opened the door to rebuttal argument by the prosecutor and thereby waived any subsequent challenge.

Even if this Court were to conclude that the comment was improper, any error was harmless. The evidence establishing that defendant was in possession of a firearm was overwhelming and included defendant's admission to police that he bought the gun, a bill of sale evidencing his purchase of the firearm, and discovery of a box in defendant's van containing ammunition matching the gun. Moreover, the trial court adequately instructed the jury that evidence of the tip was admitted for the limited purpose of explaining why the officer searched for defendant.

In light of the foregoing, no likelihood exists, let alone a reasonable likelihood, that the outcome of the trial would have been different absent the prosecutor's remarks. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial and this Court should affirm the conviction.

Sufficiency of the Evidence. Defendant's claim that the evidence was insufficient to support the verdict also fails. As noted above, the evidence was overwhelming that defendant possessed a firearm. Moreover, defendant's insufficiency claim on the conviction for possession of the knife was not preserved in the trial court below. In any case, because the "fighting style" knife was found in defendant's van next to his seat, readily accessible to his reach, the evidence was more than sufficient to support the jury's verdict.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

A. Procedural Background.

Before trial, defendant moved to exclude testimony of the anonymous report to AP&P that defendant was brandishing a firearm in a white van. R. 99: 2-3.[1] In denying the motion, the trial court ruled that the statement was not hearsay because the State did not offer it to prove the truth of the matter asserted, i.e., that defendant had a gun, but rather to explain why AP&P took the action it did. R. 99: 3-4.[2]

Consistent with the trial court's ruling, the prosecutor elicited testimony of the anonymous tip for the purpose of explaining why Officer Eckman of AP&P was looking for defendant and why he searched defendant's residence for a firearm. *See* R. 99: 51-52. However, defense counsel inquired into the reliability of the anonymous report in his cross-examination of Officer Eckman:

> Defense Counsel: Now, you testified earlier that you'd received a call on June– was it June 9th that you received the call?
>
> Officer Eckman: Yes sir.
>
> Defense Counsel: And that someone had told you that [defendant] was brandishing a firearm, isn't [that] correct?

---

[1]The following transcript pages are included in Addendum A: R. 99: 2-4, 51-52, 78-79, 154-56, 163-64.

[2]An out-of-court statement is hearsay only if it is "offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c).

Officer Eckman They'd in [sic] use brandishing, but they said he was exhibiting a firearm and threatening people, Yes sir.

Defense Counsel Who was it that phoned that in to you?

Officer Eckman I have no idea.

Defense Counsel You in fact, ask[ed] some follow-up questions of the individual, isn't [that] correct?

Officer Eckman That's correct.

Defense Counsel Don't you think that it would have been important to ascertain who that individual was?

Officer Eckman I did ask who that individual was and they refused to provide me their name.

Defense Counsel The individual refused to provide you their name?

Officer Eckman That's correct.

Defense Counsel As a result of that, you weren't able to make any kind of follow-up with that individual, were you?

Officer Eckman Only other than going out and checking defendant, no.

Defense Counsel But with that individual[,] you weren't able to go and verify whether or not that individual was telling the truth[,] isn't that correct?

Officer Eckman I had no indication that she wasn't or was telling the truth.

R. 99: 78-79.

Attempting to respond to defendant's point on cross-examination, the prosecutor conceded that the anonymous report would have been more reliable had the caller left her name. R. 99: 154. However, defendant objected before the prosecutor could continue with his argument. R. 99: 154-55. After sustaining defendant's objection, the trial court instructed the jury that the tip "was not admitted for the truth or falsity of the statement, but

simply as a basis for the position that Mr. Eckman took, and the actions he took [a]nd that [is] all it is to be considered for, and for no other reason." R. 99: 155.

After the court instructed the jury, the prosecutor also explained to the jury that the anonymous tip was only admitted to show why Officer Eckman went looking for defendant. R. 99: 155. However, the prosecutor continued, arguing that the tip was verified by the bill of sale, establishing that defendant had the gun, and the fact that defendant was driving a white van. Defense counsel immediately objected and the trial court again sustained the objection. R. 99: 156. Although defense counsel did not request another curative instruction, he addressed the limited admissibility of the tip in his closing argument as follows:

> Again, just–I will caution about the person, the unnamed person that called and said that –that [defendant] was brandishing a gun. As the judge instructed you, that–that was only submitted as foundation. In other words, so that your [sic] knew what the reason was that [Officer] Eckman went out and started looking for [defendant]. That is not evidence that he actually had possession and control [of] the gun. The [sic] that's not to be considered as evidence by you.

R. 99: 163-64.

After sentencing, defendant filed a motion for new trial, arguing that the prosecutor's comments about the tip constituted prosecutorial misconduct which substantially prejudiced defendant. R. 47-53, 67-76. The trial court denied defendant's motion for a new trial and defendant now appeals. R. 94-96.

B. Standard for Granting a New Trial Based on Prosecutorial Misconduct.

Because the trial court is in the best position to assess the impact of an alleged error, this Court will not reverse a trial court's ruling on a claim of prosecutorial misconduct absent

an abuse of discretion. *Longshaw*, 961 P.2d at 927; *Loose*, 2000 UT 11, ¶ 8. When deciding whether a prosecutor's remark warrants reversal, this Court engages in a standard error-harm analysis. First, the Court determines "'whether the prosecutor has called the jury's attention to matters the jury would not be justified in considering.'" *State v. Finlayson*, 956 P.2d 283, 292 (Utah App. 1998) (quoting *State v. Span*, 819 P.2d 329, 335 (Utah 1991)), *aff'd on other grounds*, 2000 UT 10. If the Court concludes that an improper comment was made, it then determines "'whether, under the circumstances of the particular case, there was a probability that the jurors were influenced by the prosecutor's remarks.'" *Id.* (quoting *Span*, 819 P.2d at 335). Defendant has shown neither error nor harm.

C. The Prosecutor's Comment on the Anonymous Tip Did Not Constitute Misconduct Meriting Reversal.

1. The Prosecutor's Comment Was Not Improper.

The trial court correctly ruled that the State could offer testimony of the anonymous tip to explain why Officer Eckman began looking for defendant. *See State v. Bryant*, 965 P.2d 539, 547 (Utah App. 1998) (holding that "the victim's statements as reported by the officer were admissible to explain why the officer took the investigative steps that he did"). Consistent with that ruling, the State elicited Officer Eckman's testimony that he began looking for defendant on a possible parole violation when he received the anonymous tip that defendant was brandishing a firearm. R. 99: 51-52. As in *Bryant*, "[t]he officer's testimony was never offered as anything other than a recital of the [ ] report of the offense and did not purport to represent the truth of the matter asserted." *Bryant*, 965 P.2d at 547. Recognizing

as much, defendant did not object to the testimony at trial and does not challenge its admission on appeal. R. 99: 52; *see* Aplt. Brf. at 1-2.

Defendant claims, however, that the prosecutor's comments in closing about the anonymous tip were improper and merit a new trial. Aplt. Brf. at 1. After acknowledging that the tip was only offered to "lay a foundation as to why Officer Eckman went out looking for [defendant]," the prosecutor stated:

> However, that tipster's information was verified in two regards. First, [defendant] was in fact driving a white van. And second of all, [Ms. Johansen] gives the officer a bill of sale which she got out of the glove box apparently, showing that [defendant], in fact, did have a gun. So we submit that the tipster's information was verified after the fact.

R. 99: 155-56. Defendant immediately objected. R. 99: 156. Having just instructed the jury that the tip could only be considered to explain why Officer Eckman took the position he did, the trial court sustained the objection. R. 99: 155-56.

"In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial." *State v. Cummins*, 839 P.2d 848, 852 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993). Thus, evidence introduced by the State or arguments made by the prosecutor that are otherwise inadmissible may be rendered admissible and appropriate if defendant "opens the door" by his own evidence or argument. *See State v. Colwell*, 2000 UT 8, ¶ 31 (explaining that "whether the prosecutor erred in inquiring into the defendant's prior riot conviction is dependent upon whether the 'defendant opened the door' to the prosecutor's inquiry by his own testimony"); *see, e.g., State v. Bowman*, 945 P.2d 153, 157 (Utah App. 1997) (holding

that by arguing for acquittal based on the State's failure to secure a witness, defendant opened the door to the prosecutor's remark that defendant could have subpoenaed the witness); *State v. Tucker*, 800 P.2d 819, 823 (Utah App. 1990) (holding that defendant opened the door to prosecutor's questioning about the specifics of a prior forgery conviction where defendant misstated the facts and tried to explain away the conviction); *State v. Humphrey*, 793 P.2d 918, 925 (Utah App. 1990) (holding that it was not misconduct for the prosecutor to comment on the defendant's failure to participate in a lineup where the defendant opened the door by arguing that a lineup was not conducted).

By "opening the door," a defendant waives the right to challenge any related evidence or argument propounded by the State. *See State v. Ramos*, 882 P.2d 149, 154 (Utah App. 1994) (holding that the defendant cannot appeal the admission of a mug shot because he opened the door to its admission when he elicited testimony regarding its existence on cross-examination). As observed by the Kansas Supreme Court, "when a defendant opens an otherwise inadmissible area of evidence during the examination of witnesses, the prosecution may then present evidence in that formerly forbidden sphere." *State v. Johnson*, 905 P.2d 94, 100 (Kan. 1995). Recognizing such a waiver "prevent[s] one party in a criminal trial from gaining and maintaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression." *People v. Miller*, 890 P.2d 84, 98-99 (Colo. 1995) (en banc).

As explained, the State could not offer in evidence the anonymous tip to prove the truth of the matter asserted–that defendant possessed a gun–and it did not do so when the

prosecutor questioned Officer Eckman. However, defendant placed the reliability of the tip directly in issue, and thus opened the door to the prosecutor's response, when defense counsel cross-examined Officer Eckman. On cross-examination, defense counsel elicited testimony from Officer Eckman that he was unable to learn the identity of the caller or verify the accuracy of the report. R. 99: 78-79. By questioning Officer Eckman about the reliability of the tip, defense counsel opened the door to argument from the prosecutor countering defendant's suggestion that the tip was not reliable. Accordingly, the prosecutor's comment that the tip was verified by the bill of sale and the fact defendant was driving a white van did not constitute misconduct.

2. Even If Improper, the Prosecutor's Comment Did Not Substantially Prejudice Defendant.

Even if the prosecutor's comment regarding the anonymous tip were judged improper, defendant has failed to show he was harmed by the comment. Where, as here, the alleged error "does not impact a federal constitutional right, the test used for determining an error's harmfulness is whether there is a reasonable likelihood that absent the error a different result would have occurred." *State v. Emmett*, 839 P.2d 781, 784 (Utah 1992). Here, the evidence was compelling and no likelihood exists, let alone a reasonable likelihood, that defendant would have been acquitted absent the prosecutor's remarks.

Under Utah Code Ann. § 76-10-503(2) (Supp. 1997), a convicted felon on parole "may not have in his possession or under his custody or control any . . . dangerous weapon." The gun Ms. Johansen surrendered to police at the direction of defendant was undeniably a

dangerous weapon and defendant has not claimed otherwise. *See State v. Davis*, 711 P.2d 232, 234 (Utah 1985) (holding that an unloaded 22 caliber pistol is a dangerous weapon).

The evidence establishing that defendant had "in his possession or under his custody or control" the 44 caliber Red Hawk Reuger handgun was substantial. Indeed, the prosecutor's comment paled in significance to the weight of the evidence supporting the conviction. Defendant admitted to Officer Stidham that he had purchased the 44 caliber handgun from a friend. R. 99: 42. Ms. Johansen produced a bill of sale dated only six days before defendant's arrest showing that defendant bought the gun found at Johansen's home. R. 99: 68-69. Defendant told Officer Stidham that the gun was at the home of Ms. Johansen, with whom he had been staying at the time. R. 99: 42, 130. At defendant's direction, Johansen surrendered the gun to police and showed police the drop ceiling where defendant had put the gun. R. 99: 43-44, 48, 93. Finally, a box containing 44 caliber shells, both spent and unspent, was found in the van driven by defendant. R. 99: 64-65, 82-83. These facts conclusively establish that defendant possessed the weapon, controlling its use and management. *See Davis*, 711 P.2d at 233.

Moreover, any conceivable harm occasioned by the prosecutor's comment on the anonymous tip was obviated by the trial court in its instruction to the jury just before the comment. Defendant acknowledges the court's curative instruction, but argues that because it came before the challenged comment, it did not cure the harm. However, a review of the exchange reveals that the trial court adequately addressed any error. The exchange proceeded as follows:

Judge

This statement that was admitted was not admitted for the truth or falsity of the statement, but simply as a basis for the position that Mr. Eckman took, and the actions he took [a]nd that [is] all it is to be considered for, and for no other reason.

Prosecutor

In other words, we're not alleging that [defendant] was actually brandishing the firearm, because we didn't have anybody who saw him do that. We don't have that person's name. But because of that tip, we wanted to find [defendant], and find out what he was doing and why he–whether, in fact, he had a gun. And that's all that information was being admitted for. It's to lay a foundation as to why Officer Eckman went out looking for him. However, that tipster's information was verified in two regards. First, [defendant] was in fact driving a white van. And second of all, Heather gives the officer a bill of sale which she got out of the glove box apparently, showing that [defendant], in fact, did have a gun. So we submit that the tipster's information was verified after the fact.

Defense Counsel

The same objection, Your Honor.

Judge

Sustained.

R. 99: 155-56. Defense counsel did not seek another instruction. R. 99: 156.

Because the trial court sustained defendant's objection which immediately followed the prosecutor's comment, and because the court's instruction was given just moments before the challenged comment, the jury must have understood the nature of the objection and the reason it was sustained. Unless there is an overwhelming probability that the jury was unable to follow an instruction given by the trial court and a strong likelihood that the improper evidence or statement was devastating to defendant, this Court will presume that the jury

followed the instruction. *See State v. Harmon*, 956 P.2d 262, 273 (Utah 1998) (*citing Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8 (1987)). Nothing here suggests that the jury could not or did not follow the instruction.

Moreover, defense counsel had the last word on the subject, reiterating for the jury in his closing argument the trial court's instruction directing the jury to consider evidence of the tip only to explain why the officer looked for defendant. R. 99: 163-64. It should also be noted that the prosecutor's remarks did not misstate the facts. That defendant was driving a white van and that a bill of sale evidenced defendant's purchase of the gun were facts properly before the court and well known to the jury.

Given the compelling, direct evidence of defendant's possession of the gun and the trial court's sustaining of defendant's objection, just moments after it's curative instruction to the jury, no likelihood exists that the outcome of the trial would have been different had the prosecutor not commented on the anonymous tip.

* * *

Because the prosecutor's comment on the anonymous tip was proper, and because any harm occasioned by the comment was negligible in any event, the trial court acted within its discretion in denying defendant's motion for a new trial. In short, it cannot be said that the trial court's ruling was so unreasonable and plainly wrong that defendant was denied a fair trial by virtue of the prosecutor's comment. *See State v. Tenney*, 913 P.2d 750, 757 (Utah App. 1996), *cert. denied*, 923 P.2d 693 (Utah 1996). Accordingly, defendant's claim fails and this Court should affirm the conviction.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT.

Defendant also asserts that the evidence was insufficient to support the verdict. Aplt. Brf. at 2. Like his misconduct claim, however, defendant's insufficiency claim also fails.

The appellate court does not sit as a second fact finder, determine guilt or innocence, or otherwise substitute its judgment for that of the jury. *Lamm*, 606 P.2d at 231; *State v. James*, 819 P.2d 781, 784 (Utah 1991). The jury alone weighs the evidence and determines the credibility of witnesses. *Lamm*, 606 P.2d at 231. Accordingly, when reviewing an insufficiency claim, the appellate court "view[s] the evidence and all reasonable inferences drawn therefrom in a light most favorable to the jury verdict." *State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992).

The Court will reverse a jury verdict for insufficient evidence "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Petree*, 659 P.2d 443, 444 (Utah 1983), *superceded by rule on other grounds*, *State v. Walker*, 743 P.2d 191 (Utah 1987). In other words, the Court will sustain a jury verdict so long as there is "any evidence or reasonable inferences that can be drawn from the evidence from which the jury could make findings of all the elements of the crime beyond a reasonable doubt." *State v. Brown*, 853 P.2d 851, 860 (Utah 1992).

A. The Evidence Was Sufficient to Support the Jury's Verdict Finding Defendant Guilty of Possessing a Firearm.

The evidence in this case, together with all inferences reasonably drawn from the evidence, is more than sufficient to sustain defendant's conviction for possession of a firearm by a restricted person. As discussed *infra*, at pp. 15-16, the evidence was overwhelming that the gun was in defendant's "possession or under his custody or control." *See* Utah Code Ann. § 76-10-503(2). Defendant's admission, the bill of sale, defendant's directive to Johansen to surrender the weapon to police, and the box of ammunition together provided more than sufficient evidence of defendant's guilt.[3]

Defendant contends that the evidence was insufficient given the testimony of Heather Johansen and Bill Besmehn, the person identified on the bill of sale as the seller of the gun. Aplt. Brf. at 10-11. According to them, the gun was not actually sold, but rather used as collateral for a loan from defendant so Besmehn could pay his rent. R. 99: 94-96, 107. They also claimed that defendant never had actual possession of the gun nor the ability to control the gun. R. 99: 96-97, 109. The jury, however, "is not obliged to believe the claims of defendant's witnesses." *Davis*, 711 P.2d at 234. Where, as here, the testimony of a defendant's witnesses is fraught with inconsistencies and contradictions, the Court must "assume that the jury believed the evidence supporting the verdict," rejecting defendant's version of events. *State v. Dunn*,850 P.2d 1201, 1213 (Utah 1993). Indeed, the inconsistencies and contradictions in the testimony of Johansen and Besmehn only bolstered

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[3]That defendant was a restricted person under the statute is undisputed. *See also* R. 99: 51-52, 54.

the State's case. *See State v. Smith*, 726 P.2d 1232, 1235 (Utah 1986), *State v. Gellatly*, 449 P.2d 993, 995 n.2 (Utah 1969).

Johansen testified that defendant loaned Besmehn $300 so he could pay his rent and that Besmehn agreed to use the gun "for more or less reinsurance that he would pay [defendant] back." R. 99: 107. However, Johansen discounted any role she had in the alleged loan, twice testifying that she "wasn't paying much attention" to the discussion between defendant and Besmehn regarding the loan. R. 99: 107, 117. On the other hand, Besmehn's testimony elevated Johansen's role in the alleged loan. Referring to defendant and Johansen, Besmehn testified that "they" agreed to loan him the money, but added that the agreement was "actually with [Johansen]." R. 99: 94, 96. Besmehn also testified that defendant knew he was good for the loan and would repay him and that it was Johansen who demanded collateral. R. 99: 102. Yet, Johansen testified that giving the gun as collateral was not her idea and that she "didn't want anything to do with it." R. 99: 109, 117.[4]

The testimony of Johansen and Besmehn also contradicted statements they made to police. For example, the day after defendant's arrest, Johansen gave police a written note indicating that defendant "*left his gun* in [her] possession." R. 99: 74 (emphasis added). This statement not only implies that defendant personally gave the gun to Ms. Johansen, but also demonstrates her understanding that the gun belonged to defendant. Johansen gave

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[4]Another inconsistency in their testimony included the time in which the loan should be repaid. Ms. Johansen testified that the loan would be repaid in about a month, R. 99: 116, but Besmehn testified that "it was supposed to be just a week loan." R. 99: 102.

police yet another written statement indicating she was with defendant "when *he purchased* the Reuger Red Hawk, serial number 500-00864, *and a box of bullets* from Bill Besmehn." R. 99: 72 (*see, infra* at p. 7, for the text of the full statement). Nothing in this statement suggests that the gun was simply collateral, but rather it confirms defendant's purchase of the gun. Mention of the box of bullets also strengthens the link between the 44 caliber shells found in defendant's van and the gun. Moreover, although Besmehn told police that defendant was only holding the weapon because he had loaned Besmehn $300, he could not explain the bill of sale evidencing defendant's purchase of the gun. R. 99: 76. Remarkably, with just over a year to think about it, Besmehn testified that the bill of sale was executed to prevent him from claiming the gun was stolen in order to get the gun back. R. 99: 94, 99.

Given the overwhelming weight of the State's evidence and the contradictory and inconsistent testimony of defendant's witnesses, which only bolstered the State's already compelling evidence, it cannot be said that the evidence was "so lacking and insubstantial that reasonable [people] could not possibly have reached a verdict beyond a reasonable doubt." *Lamm*, 606 P.2d at 231. Accordingly, this Court should affirm defendant's conviction for possessing a firearm.

B. Defendant Failed to Preserve His Claim That the Evidence Was Insufficient to Establish He Possessed the Knife.

Defendant also claims that the evidence was insufficient to establish he possessed the knife. Aplt. Brf. at 2. However, because he did not raise this claim in the trial court, he is precluded from raising it for the first time on appeal.

The appellate courts have long adhered to the rule that issues not raised at trial, including constitutional issues, will not be considered for the first time on appeal absent plain error or exceptional circumstances. *State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994). Where, as here, a "defendant 'does not argue that "exceptional circumstances" or "plain error" justifies a review of the[se] issue[s],' this court will 'decline to consider [them] on appeal.'" *Bryant*, 965 P.2d at 547 (quoting *State v. Pledger*, 896 P.2d 1226, 1229 n. 5 (Utah 1995)) (brackets in original).

The principle underlying the preservation requirement in general "is that in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it." *State v. Eldredge*, 773 P.2d 29, 36 (Utah 1989), *cert. denied, Eldredge v. Utah*, 493 U.S. 814, 110 S.Ct. 62 (1989). The same principle applies in the requirement that a defendant preserve an insufficiency claim. In fact, the Utah Rules of Criminal Procedure provide a number of ways in which a defendant may bring an insufficiency claim before the trial court. Rule 17 provides:

> At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Utah R. Crim. P. 17(o). Likewise, rule 23, Utah Rules of Criminal Procedure, provides an avenue for an arrest of judgment "if the facts proved or admitted do not constitute a public offense." A motion for a new trial may also be used to bring an insufficiency claim before the trial court. *See* Utah R. Crim. P. 24.

Defendant failed to preserve his claim in the trial court below. He did not move for a directed verdict under rule 17 nor did he move for an arrest of judgment under rule 23. Although he filed a motion for a new trial, he limited his insufficiency claim to possession of a firearm by a restricted person. *See* R. 47-53, 67-76. On appeal, defendant neither asserts plain error nor exceptional circumstances, and therefore, this Court should not address his insufficiency claim on appeal. *See Bryant*, 965 P.2d at 547.

Even on its merits, however, defendant's claim fails. This Court has observed that "[i]n order to establish constructive possession, the prosecution must prove 'that there was a sufficient nexus between the accused and the [item] to permit an inference that the accused had both the power and the intent to exercise dominion and control over the [item].'" *State v. Rivera*, 906 P.2d 318, 319 (Utah App. 1995), *rev'd on other grounds*, 943 P.2d 1344 (Utah 1997) (quoting *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)) (brackets in original).

Here, the evidence amply supported defendant's conviction for possession of the knife and was neither insubstantial nor inconclusive. The evidence established that the knife was found next to the driver's seat in the van which defendant reported to AP&P he would be driving and which he was driving at the time of arrest. R. 99: 62-63, 82-86. Moreover, the knife was well within the reach of the driver's right hand. *See* R. 99: 86. Although defendant's witnesses testified that the knife was that of a passenger sitting behind defendant, the appellate court must assume that the jury, as the exclusive judges of the credibility of the witnesses, rejected their testimony. *See Dunn*, 850 P.2d at 1213. In short, the evidence was

not "so lacking and insubstantial that reasonable [people] could not possibly have reached a verdict beyond a reasonable doubt." *Lamm*, 606 P.2d at 231.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted this 3rd day of February, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2000, I served two copies of the attached Brief of Appellee upon the defendant/appellant, SHANNON JESS ASHCRAFT, by causing the same to be [ ] hand delivered [X] mailed, via first class mail, postage prepaid, to his/her counsel of record, as follows:

JULIE GEORGE
321 South 600 East
Salt Lake City, UT 84102

Jeffrey S. Gray
Assistant Attorney General

ADDENDA

Addendum A

(R. 99: 2-4, 51-52, 78-79, 154-56, 163-64)

PROCEEDINGS

Judge Dever: Are we ready on the Shannon Ashcraft matter? What's the status (inaudible)audible) Just have a seat. Are we ready to proceed on this matter? Are there any preliminary matters to be raised?

Mr. Freestone: Yeah, Your Honor, I just have one issue that -- that we need to deal with probably.

Judge Dever: Okay. This is case No. 981300353. Shannon Jess Ashcraft, is your name?

Ms. Ashcraft: Yes Sir.

Judge Dever: Okay. And what's happening here counsel?

Mr. Freestone: Your Honor, we're prepared to go to trial. I just had a quick Motion in Limine I'd like to bring. This is in anticipation of testimony by Officer Eckman. In his report it states that he received a call from, apparently some unknown female who said that Mr. Ashcraft was brandishing a gun in a white vehicle somewhere. To my knowledge, they don't have any knowledge who this person was. (inaudible)audible) in anticipation of him testifying to that, we'd like to object and make sure that there's a ruling on that before it comes up. It could be very prejudicial. Our objection would be...

Judge Dever: Well, it's not offered to prove the truth of the matter contained is it?

Mr. Jeppesen: That's correct. It's...

Judge Dever: It's being just offered to show why Mr. Eckman did what he did?

Mr. Freestone: Well, it certainly would be prejudicial and could be used as proof of the matter. The whole issue here is whether or not he ever had possession of a firearm.

Judge Dever: Mr. Jeppesen?

Mr. Jeppesen: I submit that it is not being offered -- it's not hearsay because it's not being offered to prove that he had the gun at the time, but only as to why the probation office was so concerned about looking for the defendant. And the fact why the officer subsequently went back on duty after hours to locate him.

Mr. Freestone: I don't think that that's...

Mr. Jeppesen: Otherwise we have no reason for stopping him in the first place.

Judge Dever: Well I don't think that it's being offered to show that he had a gun, it's being offered to show why the probation department took the action that they took. How else are you going to explain to the jury what's happening here? The

probation officer is going to get on the standard testify is he not? That he received a telephone call that Mr. Ashcraft was engaged in an activity that was prohibited. And so he went looking for him.

Mr. Freestone: And engaged in an activity that was prohibited would be fine, but he specifically says that he received a telephone call and that person said that he was brandishing a firearm, you know, that's hearsay and that is definitely prejudicial.

Mr. Jeppesen: Well that fact is that when he was stopped, the gun was not found in the vehicle and yet the officers continued to press as to where the firearm was. And in fact, then, because of speaking with the Defendant we were able to find it. And without that explanation why would they even be looking for a firearm?

Judge Dever: Well, Mr. Freestone, I think that it's not hearsay. I think that it explains why the officers did what they did. And without that explanation the jury is not going to understand why they were looking for something. So I'll overrule your objection.

Mr. Freestone: Thank you Your Honor.

Judge Dever: Are we ready to proceed?

Mr. Freestone: We are

Probation and Parole for eight years, almost nine years. Just recently, two years ago, was certified as a Category One police officer on some of the things that were happening in corrections.

Mr. Jeppesen: Prior to becoming a parole agent, I understand you were a security -- or a guard at the prison?

Officer Eckman: Yes sir.

Mr. Jeppesen: How many years did you do that?

Officer Eckman: Approximately 2 1/2.

Mr. Jeppesen: Thank you. Now, are you acquainted with the dependent, Shannon Ashcraft?

Officer Eckman: Yes sir.

Mr. Jeppesen: And with relation to this case, how did you first become aware of him?

Officer Eckman: With this case?

Mr. Jeppesen: Uh-huh.

Officer Eckman: I had received a telephone call on June 9th indicating that the subject had been brandishing a firearm in front of different people in the community and making threads toward them. The vehicle was described, and I couldn't get a description on the types of weapons, but they did say that he was brandishing firearms.

Mr. Jeppesen: And were you aware as to his

status on the date?

Officer Eckman: Yes sir.

Mr. Jeppesen: And what was that?

Officer Eckman: He was on parole to us -- had parole from the Utah state prison in February 1998.

Mr. Jeppesen: That's when he was released on parole? In February?

Officer Eckman: That's correct.

Mr. Jeppesen: And were you his direct supervising agent?

Officer Eckman: No sir.

Mr. Jeppesen: And who was his agent?

Officer Eckman: Mike Hansen.

Mr. Jeppesen: Alright. When you received this information over the phone, what did you do?

Officer Eckman: I shared the information with the only other agent in the office, who was Lonnie Walters. It was then determined that we should go out and look for him and the vehicle. And try and make a determination fi there were weapons in the vehicle.

Mr. Jeppesen: Alright. His supervising agent wasn't available that day?

Officer Eckman: He was off on that day, I believe.

Mr. Jeppesen: I'll show you what's marked as

a restricted person, is that correct?

Officer Eckman: As I understand it, yes sir.

Mr. Freestone: And he has not been charged here today with purchase of a firearm by a restricted person, isn't that correct?

Officer Eckman: That's correct, yes sir.

Mr. Freestone: Now, you testified earlier that you'd received a call on June -- was it June 9th that you received the call?

Officer Eckman: Yes sir.

Mr. Freestone: And that someone had told you that Mr. Ashcraft was brandishing a firearm, isn't correct?

Officer Eckman: They'd in use brandishing, but they said he was exhibiting a firearm and threatening people, Yes sir.

Mr. Freestone: Who was it that phoned that in to you?

Officer Eckman: I have no idea.

Mr. Freestone: You in fact, ask some follow-up questions of the individual, isn't correct?

Officer Eckman: That's correct.

Mr. Freestone: Don't you think that it would have been important to ascertain who that individual was?

Officer Eckman: I did ask who that individual was and they refused to provide me their name.

Mr. Freestone: The individual refused to provide you their name?

Officer Eckman: That's correct.

Mr. Freestone: As a result of that, you weren't able to make any kind of follow-up with that individual, were you?

Officer Eckman: Only other than going out and checking the defendant, no.

Mr. Freestone: But with that individual you weren't able to go and verify whether or not that individual was telling the truth isn't that correct?

Officer Eckman: I had no indication that she wasn't or was telling the truth.

Mr. Freestone: Now when you, in fact, requested that Shannon exit the vehicle, at that time, you testified there were four individuals in the vehicle, correct?

Officer Eckman: Yes sir.

Mr. Freestone: Okay. There was an individual who was seated directly behind Shannon, isn't that correct?

Officer Eckman: Yes sir.

Mr. Freestone: That individual's name is

aware that everything they had said was incriminating Shannon. Bill Besmehn gives Shannon a document which he freely admits appears to be a bill of sale. He is listed as the seller and the defendant as the buyer. He admits that Shannon's the one who gave him to $300. As to the knife, we really submit that there's not much argument over the knife. Now, the knife was right next Shannon's body as he sat in the seat, in the seat belt holder next to him where all he had to do was reach down with one hand and pull it up out of scabbard. If that isn't being in possession or having dominion and control, I don't know what is. It was accessible to his right hand at any time. Now the defendant makes a point on cross-examination that the person who called in the tip that Shannon was brandishing a firearm, or threatening people with it, when he was in the white van, didn't leave a name. And of course if a person leaves their name we're going to give them a little more credibility than someone who doesn't. But put yourself...

Mr. Freestone: Your Honor, I'm going to object to this - to this closing statement regarding the statement of the unidentified person. The reason that was admitted, if you recall, was for foundation, not for truth of the matter asserted. At this point,

he's arguing that truthful matter asserted.

Judge Dever: Well, ladies and gentlemen...

Mr. Jeppesen: I don't think I'm doing that Your Honor, that's not my intent.

Judge Dever: This statement that was admitted was not admitted for the truth or falsity of the statement, but simply as a basis for the position that Mr. Eckman took, and the actions he took. And that all it is to be considered for, and for no other reason.

Mr. Jeppesen: In other words, we're not alleging that Shannon was actually brandishing the firearm, because we didn't have anybody who saw him do that. We don't have that person's name. But, because of that tip, we wanted to find Shannon Ashcraft, and find out what he was doing and why he -- whether, in fact, he had a gun. And that's all that that information was being admitted for. It's to lay a foundation as to why Officer Eckman went out looking for him. However, that tipster's information was verified in two regards. First, Shannon was in fact driving a white van. And second of all, Heather gives the officer a bill of sale which she got out of the glove box apparently, showing that Shannon, in fact, did have a gun. So we submit that the tipster's

information was verified after the fact.

Mr. Freestone: The same objection, Your Honor.

Judge Dever: Sustained.

Mr. Jeppesen: Now, Bill Besmehn, he immediately indicates that the defendant is his good buddy. And obviously he doesn't want his good buddy to get in trouble. He recognizes the Rueger Red Hawk. He indicated that he and Heather came over to see him about the gun. Why would they come over to see about the gun if, in fact, Bill is trying to get a loan from them, and then later, they decide to use the gun as collateral? I submit that his story doesn't jive in that regard. Heather, as you will recall, says that Shannon alone was the one who made the deal for the loan. She wasn't there. Bill says that they both came over when Shannon paid the $300. He gave - Shannon gave him the $300, but didn't take the collateral. Does that stand reason? Would a person do that if they were taking the gun as collateral, why would they leave it will be the borrower? His bill of sale specifically designates, of course again, that Shannon's the buyer. The loan transaction only came up a month later after the defendant had been arrested and put in jail. Heather indicated that the loan was

parole. And then the testimony was that, on the third day, Heather goes up and retrieves the gun herself. She brings it back and she leaves it with her mother's boyfriend. He was indicating that he'd keep it in his safe. Now, it was suggested by the State that, because Shannon called, at the request of Officer Stidham, and asked her to turn the gun over to Officer Stidham, that that somehow indicates that he had possession and control over the gun. What does the State expect? Did he would refuse to do that? He cooperated. He called her and said, you know, would return this over? But what's important is, he called Heather Johansen. He didn't call her mother's boyfriend. I mean, there's no evidence that he even knew that's where the gun was. But he knew that he had asked her to go up and get the gun, so he knew that she had possession and control of the gun. Again, just -- I will caution about the person, the unnamed person that called and said that -- that Mr. Ashcraft was brandishing a gun. As the Judge instructed you, that - that was only submitted as foundation. In other words, so that your knew what the reason was that Mr. Eckman went out and started looking for Mr. Ashcraft. That is not evidence that he actually had possession and control the gun. The

that's not to be considered as evidence by you. Okay. So, in the Wal-Mart parking lot, Mr. Ashcraft and the occupants of the car are stopped. Okay. The car is searched. No firearm in his possession. It's not in the car. It's not on his person. Okay, they do find - they do find a knife and Victor Lopez admits, right there, that that knife is his. and its placed right front of him. A lot of "to do" is made by the State that that was within the reach of Mr. Ashcraft. Well, Yeah, it was, but it was also right there within the reach of Victor Lopez who set it down right front of him. That's where he was seated. Now, the State also pointed out that -- that Heather's testimony was she went and got the gun from where she had stored it, and took it into the storage room and she put it on the shelf. Now, if you will remember the reason she put on the shelf, she said, was to keep it away from the reach of children. Now, there was no indication that she knew how long it was going to take for Officer Stidham to get there. And then when Officer Stidham got there, then she went in and got it put it, only it was later on whenever Officer Stidham came, she went and got it and put it on the bar. Now, the State pointed out some inconsistencies between what Bill Besmehn said about arriving at the agreement to loan